

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

February 9, 2006

In the Matter of
Jay Santos

Docket No. 2005-247
File No. UAO-NE-05-06W011
Millis

RECOMMENDED FINAL DECISION


The petitioner in this matter, Jay Santos, requested an adjudicatory hearing on the above referenced Unilateral Administrative Order (UAO) by filing a fee transmittal form. The form records the petitioner's name and address, the UAO number and enclosed the \$100 appeal filing fee. On January 9, 2006, I issued an Order for A More Definite Statement, seeking a clear and concise statement of the factual basis of the appeal, the relief requested a copy of the document being appealed, and payment of the \$100 filing fee as the initial payment by check had been returned unpaid. All of this information, and payment, was ordered to be submitted by January 18, 2006, upon pain of dismissal under 310 CMR 1.01(6)(b).

Response to Order for More Definite Statement

In response to this Order, the petitioner filed with this office a copy of the appealed document on January 20, 2006, two days past the established deadline. No other statement has been submitted nor has payment of the appeal filing fee been paid.

This information is available in alternate format. Call Donald M. Gomes, ADA Coordinator at 617-556-1057. TDD Service - 1-800-298-2207.

DEP on the World Wide Web: <http://www.mass.gov/dep>

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The Department's rules for adjudicatory proceedings dictate minimal form and content requirements for a notice of claim for an adjudicatory appeal at 310 CMR 1.01(6)(b). All claims shall state specifically, clearly and concisely the facts which are the grounds for the appeal, the relief sought, and any additional information required by applicable law or regulation." Id. A notice of claim shall also include a copy of the document being appealed. Id.

When the contents of a notice of claim do not meet the requirements of 310 CMR 1.01 and any other applicable regulations, the Presiding Officer shall dismiss the appeal or require a more definite statement. If the person filing the notice of claim fails to file a more definite statement within the period specified, the appeal shall be dismissed.

310 CMR 1.01(6)(b) (12/17/2004).

Although the petitioner has now provided a copy of the appealed document, but has not asserted any factual grounds for the appeal, or requested any relief through this adjudicatory hearing process. No payment of the appeals filing fee has been made. As set out in the January 9th Order for a More Definite Statement, the petitioner was put on notice that if the information and payment required by the Order was not provided by the deadline established, the claim would be dismissed pursuant to 310 CMR 1.01(6)(b), 1.01 310 CMR 1.01(5)(a)15.f.vi and 310 CMR 4.06(1)(d). As the petitioner has failed as required by the Order to provide a statement of the facts underlying his appeal and a description of the relief he seeks, and has failed to pay the appeals filing fee, I recommend dismissal for failing to comply with an order evidencing lack of prosecution.

Timeliness

From the copy of the UAO the petitioner did provide, it also appears there is a fatal jurisdictional flaw of untimeliness, an independent basis for which I also recommend dismissal.

The appealed UAO does not have a date on its first page but on the last page states “issued on behalf of the Department of Environmental Protection this 10th day of November 2005” above the signature of Richard J. Chalpin, the Regional Director of the Northeast Regional Office. It goes on to provide instructions for filing an appeal. “A request for a hearing must be made in writing and must be received by the Department as provided in 310 CMR 1.01(6)(b) within twenty-one (21) days from the date of this Order.” UAO, paragraph 13.

The rules for adjudicatory hearings contain a general limitation at 310 CMR 1.01(6)(a) on the time for filing a request for a hearing, when no other specific rule applies.

The notice shall be filed within the time prescribed by any applicable provision of law, or in the absence of a prescribed time period, within 21 days from the date that the notice of Department action was sent to a person.

Beginning the count of twenty-one days on November 11th, the day after the UAO was signed, the twenty-first day is December 1, 2005. The last day for requesting an appeal was therefore December 1, 2005, assuming that the UAO was sent by mail to the petitioner on the date included within the Order as the date it was issued and signed.¹

The petitioner’s notice of claim (the fee transmittal form) was postmarked on December 2, 2005 and received by the Department on December 5, 2005. A document sent by mail is considered filed on the date postmarked under the adjudicatory proceeding rules at 310 CMR 1.01(3)(a)3. In this case, the claim was mailed and postmarked on December 2, 2005, one day after the twenty-one day time period prescribed.

¹ Although the UAO refers to the day starting the appeal time period as the date of the UAO, under 310 CMR 1.01(6)(a), the period starts with the day the Department’s document was sent to the person. When a UAO is mailed the same day it is dated, this difference will have no consequence. The UAO also indicates that the Department must *receive* a request for an adjudicatory appeal within twenty-one days, but I find no such requirement in the Wetlands Protection Act regulations (310 CMR 10.00) or the rules for adjudicatory proceedings (310 CMR 1.01).

It appears that the claim for an adjudicatory hearing was untimely, and the Department lacks jurisdiction to review this matter in an adjudicatory appeal. Matter of Sunoco Inc. (R&M), Docket No. 2003-035, Recommended Final Decision (September 16, 2003) adopted by Final Decision dated October 1, 2003; Matter of Raftery, Docket No. 2002-140, Recommended Final Decision (August 14, 2002) adopted by Final Decision dated August 11, 2003; Matter of Treasure Island Condominium Association, Docket No. 93-009, Final Decision (May 13, 1993).

I recommend that this appeal be dismissed for lack of jurisdiction due to untimeliness under 310 CMR 1.01(5)(a)2 and 310 CMR 1.01(5)(a)15.f.v. and for failing to respond to an Order and lack of prosecution pursuant to 310 CMR 310 CMR 1.01(10) and 310 CMR 1.01(5)(a)15.f.vi.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Ann Lowery
Presiding Officer

Adopted by Commissioner Robert W. Golledge, Jr., February 13, 2006.